No. 16,111

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHNNIE ELMEASE MADRIGAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ROBERT EDWARD MADRIGAN and PATRICIA ANN MADRIGAN, by and through their guardian ad litem, Fred J. Madrigan,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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I. JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment in favor of the defendant, United States of America, granted

in the United States District Court for the Northern District of California, Southern Division, the Honorable Willis W. Ritter of Utah sitting specially. The action, founded on alleged negligence and malpractice of persons for whom the defendant was legally responsible, was instituted by plaintiffs-appellants under the authority of the Federal Tort Claims Act, Title 28, U.S.C.A., Sections 1346(b) and 2674, Revised, et seq. It is upon that Act that jurisdiction of this Honorable Court is founded. The appeal proper is authorized under 28 U.S.C.A., Section 1291, notice of said appeal having been filed on May 8, 1958.

II. THE ISSUES.

Since the entire case was tried upon the theory that the United States is liable under the Tort Claims Act for its negligence in the diagnosis, treatment and care of the dependents of servicemen, once such dependents have been accepted as patients of any dispensary, or other hospital institution operated and controlled by it, we are content to eliminate this issue, if any exists, by reference to the uncontradicted testimony of Mrs. Johnnie Elmease Madrigan which established factually that she was accepted as a patient at the Alameda Naval Dispensary and, thereafter, at the United States Naval Hospital, Oak Knoll, Oakland, California (TR 19, lines 9-10, et seq.), for intermediate procedures, and finally advised to enter as an inpatient for surgery on October 29, 1951, which was

aborted by action of the defendant's agents and employees. (TR 30, lines 16-32.)

Equally clear is the established law placing responsibility on the United States, under the controlling circumstances.

United States v. Grey, 199 F. 2d 239;
Costley v. United States, 181 F. 2d 723;
Smart v. United States, 111 F. Supp. 907;
Grigalauskas v. United States, 103 F. Supp. 543.

In the *Grey* case, supra, the applicable law is set forth:

> "Having decided that there were facilities available and having accepted her as a patient, the personnel at the hospital acted within the scope of their duties or employment in treating and caring for her (plaintiff). And any negligent act or omission on their part in the discharge of such duties which proximately caused injury to plaintiff rendered the Government liable under the Tort Claims Act. *Costley v. United States,* 5 Cir., 181 F. 2d 723."

The remaining issues may be capsulized as follows:

A. When, following submission of a service dependent patient to routine pre-operative chest X-rays, and following the report of the Government's radiologist that these X-rays reflect lung pathology, most probably adult tuberculosis, is there a duty upon the Government to advise the patient within a reasonable time of the suspected condition and the necessity (under good medical standards and practices), to

initiate a series of laboratory and clinical studies for clarification of the diagnosis and control of the disease?

B. In this regard, is the error or omission, or failure to follow a prescribed course of conduct calculated to permit the completion of such X-rays, their reading and diagnosis by a competent radiologist within a usual period of one (1) day (TR 570, lines 15-25), permitting return of the X-rays to the patient's jacket in sufficient time to be observed by the physician in charge upon the return of the patient for scheduled surgery, an act of negligence, which coupled with proximate cause and damage, presents a compensable claim under the Tort Claims Act?

C. Under existing regulations charging the Commanding Officer with the duty to discover, diagnose and control infectious diseases, coupled with reasonable standards of accepted medical practice in the community within which the Government's hospital is located, is the failure to advise a patient found to have adult tuberculosis an act of negligence which, coupled with proximate cause and damages, is compensable under the Tort Claims Act?

D. Is the Government liable for acts of *omission,* as well as *commission,* under circumstances where there is a failure to advise an accepted patient of the probable existence within her lungs of pathology which, if undiagnosed with certainty as to its activity, could, and did, cause bilateral infiltration of both lungs, far advanced and active, following an insidious onset and development of symptoms?

E. If, as a direct and proximate consequence of exposure to their mother, a patient as hereinabove described, and prior to a final diagnosis of bilateral tuberculosis, far advanced, the two (2) minor children of the patient contact and develop tuberculosis, is the Government liable to these minor children if the development and spread of the disease of tuberculosis has resulted from the failure of the Government to advise the patient of its own findings relative to the suspected tuberculosis existing within the body of said patient almost four (4) years prior to its discovery by Government personnel in a far advanced, destructive form?

F. Where the great preponderance of the evidence supporting the existence of a pathological condition in the lungs of the patient in question is confirmed and verified by learned physicians and chest surgeons, one of these a Government physician who treated the patient, another the Government's employee and agent called as the Court's own witness, who diagnosed properly the pathological condition, and still another, the Government's own expert witness, is there caprice and abuse of discretion in the findings and judgment of the learned trial judge which is based almost solely upon the testimony of a single so-called conservative medical expert presented by the Government?

That such caprice or abuse of judicial discretion, if existing, is reviewable by this learned Court is clear from the language of *Sanders v. Leech,* 158 F. 2d 48, wherein (conceding that under the Federal Rules of

Civil Procedure, 52(a), 27 U.S.C.A. following Section 723, findings of fact are not usually set aside save where clearly erroneous), the Court stated:

> "It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case. (Citing, *Katz Underwear v. United States* (3 Cir.), 127 F. 2d 965; *Aetna v. Kepler* (8 Cir.), 116 F. 2d 1; *Fleming v. Palmer* (1 Cir.), 123 F. 2d 749)."
>
> See also: *Williams v. United States* (5 Cir.), 252 F. 2d 887.

III. STATEMENT OF THE CASE.

Commander Fred J. Madrigan, a United States Navy officer, with seven years in the commissioned ranks as of 1951, and fifteen years as of this writing, is the husband of Johnnie Elmease Madrigan, some twenty-seven years old at the time of the occurrences under review. Together, they had two children, Patricia Ann Madrigan, born October 6, 1948, at Portsmouth, Virginia, and Robert Edward Madrigan, born in that same city on May 2, 1950.

Mrs. Madrigan regarded herself, and she was, in fact, a vigorous, healthy woman, prior to October, 1951. Apart from hospitalization for birth of the two

children and a brief hospitalization in late 1950 or early 1951, she was an active mother and Navy wife. (TR 16, lines 10-11.)

Commander Madrigan was transferred to the west coast in July, 1951. Mrs. Madrigan and the family accompanied him to Alameda, California. At this approximate time, Mrs. Madrigan became aware of a feeling of constant fatigue, and sought medical advice in the Alameda Naval Air Station Dispensary in August, 1951. After several such appointments, she was advised to submit herself to a physician at the Oak Knoll United States Naval Hospital, Oakland, California, for a complete physical examination and a determination of the medical causes for her fatigue.

Thereafter the following events transpired:

October 12, 1951:

Mrs. Madrigan was seen by Dr. R. F. Christoff, a Naval physician, who recorded the history of her then complaint and made a diagnosis of Hallux Valgus, by definition, a growth on the soles and heels of the feet, commonly known as bunions. With this diagnosis, she was referred to Dr. C. A. Mead, a Naval orthopedist at the Orthopedic Department of Oak Knoll United States Navy Hospital at Oak Knoll, which we shall hereinafter designate as the Oak Knoll Naval Hospital, for brevity.

October 24, 1951:

Dr. Mead examined the patient, and, among other things, elicited the fact that she had foot pain and

fatigue. He recommended certain surgical procedures and ordered X-rays taken *that day,* of her feet *and her chest.* These chest X-rays were a routine pre-operative procedure and, as will later be established, were of importance in determining whether any body condition existed which would contra-indicate surgical procedure. The patient was advised to return for admission to the hospital as an in-patient.

October 29, 1951:

Mrs. Madrigan, following the advice of Dr. Mead, did return to Oak Knoll Naval Hospital for the contemplated surgery and, in the company of her husband, followed the established procedure for checking in and registering as an in-patient. (TR 30, lines 19-25.) Dr. Cruise, the chief of orthopedics, after consultation with Dr. Mead, caused the patient to be advised that in his opinion, no surgery was necessary at that time. On the contrary, conservative treatment was recommended, with certain outlined home treatments and the wearing of a particular type of shoe. The X-rays of Mrs. Madrigan's feet taken October 24, 1951, were, without question, before Drs. Mead and Cruise, these having been developed, read and placed in what is described as the patient's "jacket" *prior to her return on October 29, 1951.* As will later be demonstrated, she could not have been admitted to the hospital had the chest X-rays (following prescribed and normal routine), been before the doctors making the decision on October 29, 1951. She was advised to "check back with them . . . within a month". (TR 35, lines 21-25; TR 36, line 1.) It was the con-

tention of the Government that she never returned. It was Mrs. Madrigan's position that she did, in fact, call and report her condition as improved, to an agent of the Government at the aforesaid Oak Knoll Naval Hospital, *within a month.*

It is at this point where the history of the case is beclouded by the unpredictable and unusual events touching upon the development and reading of the chest X-rays by Dr. James G. Bulgrin, radiologist at the Oak Knoll Naval Hospital. The report on these X-rays is dated *November 9, 1951,* and this report indicated that the interpretation was made, at the request of Dr. Mead (dated October 24, 1951), on *November 8, 1951.* Dr. Mead, who had ordered these X-rays on October 24, 1951, appreciated "that these two dates seem to be at variance with what I would recall as our usual procedure in the making of these films and the subsequent reporting of these films". (TR 633, lines 16-23.) That the chest X-ray was ordered pursuant to having Mrs. Madrigan admitted as a hospital patient is nowhere denied. (TR 638, lines 6-10.) The chest X-ray was never brought to the attention of Dr. Mead prior to the time Mrs. Madrigan was scheduled for surgery on October 29, 1951. (TR 640.) Had this report been brought to the attention of Dr. Mead, he would undoubtedly have brought it to the attention of the patient and advised her of the existence of pathology in her lungs. (TR 640-641.) Thus, the crucial X-ray which strongly pointed to the necessity for immediate laboratory and clinical studies, was not before the one doctor, who, though an orthopedist, would have known the meaning of

"acid fast reinfection etiology" (tuberculosis), and made the decision to advise the patient of her condition. This—in spite of the fact that the X-rays of Mrs. Madrigan's feet were before Dr. Mead in time for Mrs. Madrigan's visit to him of October 29, 1951. The more important chest X-ray was not.

As a matter of fact, this significant X-ray report was, according to the testimony of the Court's own witness, Dr. James Bulgrin (TR 571, lines 20-22), *not read until November 8, 1951, and a report not typed until November 9, 1951.*

Within a month of the visit of October 29, 1951, Mrs. Madrigan telephoned the Oak Knoll Naval Hospital and in that telephone conversation, Mrs. Madrigan stated that "there was no mention to return to the hospital, but if they (her feet) gave me any more trouble, to let them know". (TR 39, lines 3 and 4.) Nothing was said to Mrs. Madrigan at that time regarding the X-rays of her chest which by that time had been read by Dr. Bulgrin.

Mrs. Madrigan remained in the Alameda area throughout the balance of 1951, 1952 and the first half of 1953. In that period of time, Mrs. Madrigan visited the Naval Air Station Dispensary in Alameda for an attack of sinus, but at no time was she apprised of the X-ray reading, indicating the presence of pathology.

In September, 1953, her husband having been transferred to Japan by the Navy, Mrs. Madrigan prepared to join him in that country.

Her first move was to Honolulu, Territory of Hawaii. Up to the time of this move, no chest X-rays were taken subsequent to the X-rays of October 24, 1951.

A cursory physical examination given to Naval dependents heading overseas was made in Honolulu. Again, *no chest X-rays were taken,* and still Mrs. Madrigan had no knowledge of the possibility that she might have tuberculosis.

She arrived in Yokohama, Japan, in the company of her children in October of 1953. After six weeks in Yokohama with her husband, the entire family moved to Minamiku, and in the summer of 1954, the family moved once again to "Area X", Yokohama, Japan. In May of 1954, Mrs. Madrigan was admitted to Army Hospital #8168, Yokohama, because of severe emotional problems which beset her. We feel secure in suggesting that even then, the disease was taking its toll.

She continued to demonstrate the insidious outcroppings of tuberculosis and she became increasingly nervous and more burdensome, causing her to become irritable, with a tendency towards over-indulgence in alcoholic beverages.

In May of 1955, this physical and mental state having continued without diminution, Mrs. Madrigan resolved to go to the U. S. Naval Hospital #3923, determined to find definite medical clarification of her persistent and accumulating symptoms.

She was admitted to U. S. Naval Hospital #3923 on *May 13, 1955,* at Yokohama. The diagnosis con-

firmed at that hospital was: "tuberculosis pulmonary, far advanced". (TR 58, line 12.)

This was the first time that Mrs. Madrigan ever knew that she had been suffering from tuberculosis. (TR 60, lines 5-9.)

Following that diagnosis, Mrs. Madrigan remained at the last described hospital in Yokohama for approximately two weeks, and was thence repatriated, first to Trippler Hospital in Hawaii, then to U. S. Naval Hospital, Oak Knoll, Oakland, California, from May 28, 1955, to June 13, 1955, then to Fitzsimmons Hospital in Denver. On November 1, 1955, she was transferred to Parks A.F.B. Hospital, California, where she was a tubercular in-patient until March 2, 1956, when she was given the status of an out-patient, which continues to this date.

Due to the naturally close contact between mother and children, and the well-known communicability of tuberculosis, Mrs. Madrigan's children, Robert Edward Madrigan and Patricia Ann Madrigan, were tested for tuberculosis on June 28, 1955, at Letterman Army Hospital in San Francisco, California (to which they had been returned from Japan).

Patricia Ann Madrigan, 7½ years of age, was found to have a "positive tuberculin" (TR 234, line 23) which indicates the presence of tuberculosis organisms in the body.

Robert Edward Madrigan, Mrs. Madrigan's 5-year-old son, was found to have "pulmonary infiltrate", which is considered to be primary tuberculosis. The boy was kept out of school for two months, and, al-

though his physical condition has now improved, his exposure to his mother's tuberculosis has committed him for the rest of his life to constant care and, in the foreseeable future, to semiannual physical examinations. (TR 234 through 237.)

IV. APPLICABILITY OF THE SEVERAL STATE AND FEDERAL LAWS.

We address ourselves briefly to a consideration of applicable law, arising from the laws of the State of California, within which the incidents have occurred, and such Federal law regulations and statutes as may herein be relevant.

A. The Liability of the Government Is Determined by the Substantive Law of the State of California.

Under the Tort Claims Act (supra), the United States is liable in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C.A., Section 2674. (Rev.)

B. An Action for Negligence of a Hospital or Doctor (Malpractice) May Be Maintained Under the Laws of the State of California.

Under California law the physician and surgeon, in undertaking professional service to a patient, impliedly represents that he possesses that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing practicing in the same

locality. This is, of course, equally true of hospitals and like institutions.

McCurdy v. Hatfield (1947), 30 C. 2d 492;
Lawless v. Callaway (1944), 24 C. 2d 80.

It is his duty to use the care ordinarily exercised in like cases by reputable members of his profession, practicing in the same locality; to use reasonable diligence and his best judgment in the exercise of his learning, in an effort to accomplish the purpose for which he is employed. A violation of those duties is a form of negligence characterized as malpractice. Malpractice sounds in tort.

Costa v. Regents of the U. of California (1953), 116 C.A. 2d 445.

The California Health and Safety Code, Section 2571, defines tuberculosis as a communicable disease and in Section 2573, imposes the following obligations:

> "All physicians, nurses . . . shall promptly report that fact (tuberculosis) to the Health officer, together with the name of the person, the place where he is confined and the nature of the disease, if known."

C. Navy Medical Regulations Required Early Detection, Supervision and Treatment of All Tubercular Patients.

Bureau of Medicine, Department of the Navy, "General Physicians", Chapter 22, Communicable Disease Control, Section 7, subdivision 1(c) in its relevant parts reads as follows:

> "The medical officer shall be responsible for the following: Individuals suspected of having active

tuberculosis shall be admitted to the sick list and infection precautions taken until the disability is found not to exist or the disease is determined to be inactive or arrested." (TR 664, 665.)

"The medical officer shall be on the alert for early detection of infectious diseases, shall recommend the necessary control measures to the commanding officer, and shall institute the necessary restrictions of personnel and take such other action with the approval of the commanding officer as may be required to prevent the spread of communicable disease." (TR 665, lines 15-23.)

Prior to the embarkation of Mrs. Madrigan, Navy regulations required the following:

"Navy examination at the port of embarkation shall be sufficiently complete to determine the fitness of the individual to undertake the voyage in a passenger status and *to detect the presence of an infectious disease.* Results shall be recorded on the back of the certificate and shall be forwarded if cleared for travel to the medical officer responsible for the care of such persons during travel." (TR 667, lines 17-25.)[1]

D. The Government Acknowledged and Admitted Its Basic Responsibility to Advise Patients of Abnormal Conditions in Chest X-rays.

The Government admitted in answers to plaintiffs' interrogatories eight and thirty-two that there were

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[1]In view of these strict requirements the cursory, almost indifferent examination, without requiring chest X-ray which would have conceivably alerted the authorities is almost shocking. The ONLY comment on her embarkation certificate is "OKAY". (TR 668, lines 10-14.) Counsel for the Government himself confirmed this fact!

prescribed procedures, regulations and requirements that a patient be advised of the diagnostic findings of tests, X-rays and examinations to which such patient had submitted herself and that these were in existence in 1951. (TR 759.)

Further, that during October, 1951, regulations and directives of the Navy Department and/or the Bureau of Medicine and Surgery, and accepted medical practice required follow-up procedures and treatment in cases demonstrating abnormal conditions disclosed in chest X-rays. (TR 759.)

E. The Government Is Liable for Acts of Omission as Well as Commission of Its Agents and Officers Acting Within the Scope of Their Authority.

We have urged in part that the failure of the defendant to advise, forewarn and alert plaintiff, Mrs. Madrigan, to the existence of pathology in her chest, resulted from an act of omission, i.e., failure to follow prescribed, routine, *usual and accepted standards of conduct.*

In the *Grey* case (supra), the Court stated:

> ". . . And any negligent act or omission on their part in the discharge of such duties which proximately caused the injury to plaintiff rendered the Government liable under the Tort Claims Act."

In *Costley v. United States,* 181 F. 2d 723 at 724, the Court's language is relevant:

> "Under the Tort Claims Act, the United States may be liable for money damages for injury . . . caused by the negligent or wrongful act *or omis-*

sion of any employee of the government while acting within the scope of his office . . ."

We feel there can be no serious contention regarding the existence of the Governmental DUTY in the case at bar, and face the problems of dereliction, proximate cause and resulting damage as we turn to our argument.

V. WE ARGUE OUR CASE.

A. THE X-RAYS OF OCTOBER 24, 1951, WERE PATHOLOGICAL, REFLECTING THE PRESENCE OF DISEASE.

The learned and well qualified Dr. Sidney J. Shipman, presented as a witness for the Government, offered the following under cross-examination:

"Q. Is there pathology as you view the X-ray of October 24, 1951?

A. Yes, there is." (TR 393, lines 21-23.)

We addressed question to Dr. Horton Corwin Hinshaw at page 523 of the transcript:

"Q. Would a person with lesions of the sort shown in the October, 1951 X-ray be a person then who could be stated to be 'free from infectious disease'?

A. No."

Dr. Roger Wilson, an eminent chest surgeon, examined the X-ray of October 24, 1951, found it of good quality and diagnostic. (TR 188 et seq.) He reviewed it in its entirety for the Court, indicating the areas of abnormality. His attention was directed to

the interpretation of Dr. James Bulgrin, the Navy radiologist. He agreed with it. It stated:

> "Impression: minimal fibrotic appearing infiltration left upper lung. Acid fast reinfection etiology must be considered first."
>
> "Q. Will you describe to us in simple language what this means?
>
> A. It means that the radiologist saw the opacity that I have pointed out in the left upper part of the X-ray of the lungs. 'Acid fast etiology' is a term used for *tuberculosis* in case the patient should see the record and be alarmed and 'acid fast' is colloquialism used by physicians.
>
> Q. Meaning——
>
> A. *MEANING TUBERCULOSIS.*" (Emphasis added.) (TR 214, et seq.)

Although the record is replete with medical testimony directed to this same effect, time and space require curtailment.

The Navy radiologist, Dr. James Bulgrin, was firm in his interpretation of the X-ray of October 24, 1951. He affirmed the medical significance of "acid fast etiology". (TR 586, et seq.)

> "Q. Now, when you use the term 'acid fast reinfection etiology must be considered first', what do you mean sir——
>
> A. I MEAN ADULT TUBERCULOSIS." (Emphasis added.)
>
> Q. That is a polite way of saying it, isn't it?
>
> A. Yes."

Dr. Bulgrin continued showing the reason for the use of this language and added:

"A. . . . It may be true that this is not tuberculosis. *The odds are overwhelming in favor that it is,* but that is not a certain diagnosis of tuberculosis.

Q. But the odds are overwhelming that it is.

A. Yes."

B. THERE WAS DEVIATION FROM THE NORMAL, USUAL PROCEDURES FOLLOWED IN THE GOVERNMENT'S HOSPITAL FOR THE READING, INTERPRETATION AND ACTION UPON THE OCTOBER X-RAYS.

(1) The X-ray of October 24, 1951 Required Action.

The basic question was not whether the lesions observed in the X-ray of October 24, 1951 were actually those of tuberculosis. The lesions were pathological. The evidence was strong in favor of tuberculosis. The X-rays of the feet *and chest* were ordered on October 24, 1951. The patient submitted herself on that same day. Ordinarily, following the routine at Oak Knoll Naval Hospital X-rays were ready for reading the day taken or the next day. (TR 570, lines 15-25, and 571.)

The X-rays of Mrs. Madrigan's feet were actually taken on October 24, 1951, and read and interpreted *that same day.* (TR 610.) They were present in her "jacket" and available to Dr. Mead and Dr. Cruise in the orthopedic department on October 29, 1951 when Mrs. Madrigan presented herself for admission as an in-patient for surgery. *The chest X-rays were not there.*

Had the defendant's own routine procedures been followed, then with reasonable certainty and consistent

with good practice, they would have been noted and should have been noted by Drs. Mead and Cruise, who, although orthopedists, would understand the implications of Dr. Bulgrin's interpretation.

Dr. Mead, testifying by deposition, was asked (TR 640, line 25; TR 641, lines 1-3):

> "Q. Had this report been brought to your attention you would have called it to the attention of the patient; would you not, Doctor?
>
> A. Yes, sir."

Dr. Shipman, the Government's learned expert, had this view of the problem (TR 410-418):

> "Q. . . . if you in private practice, or if you in a hospital had attended a patient, and came across a chest X-ray like this, the one in 1951 . . . if you saw anything that that woman needed, follow-up care, further treatment, further X-rays, further tests, you certainly would have gone out and got her and brought her in—sent for her and have seen she was there?
>
> A. *Yes, certainly.*" (Emphasis added.)

Dr. Horton Corwin Hinshaw, upon whose testimony the Court seemed to rely almost exclusively in its decision, faced the problem in this manner:

> "Q. Doctor, with regard to the pathology shown and with regard to Dr. Bulgrin's report thereon, would you, sir, having that X-ray in mind, and Dr. Bulgrin's reading before you, permit it to sit without further action, or would you feel that it required further investigation, further concern on the part of the doctor, for his patient?
>
> A. Yes.

Q. You feel it would?

A. That it would require further investigation, yes."

C. THE FAILURE TO HAVE THE CHEST X-RAY IN THE PATIENT'S JACKET ON OCTOBER 29, 1951, WAS DUE TO ERROR, OMISSION—NEGLIGENCE OF THE GOVERNMENT!

The Government, and in equal measure, the honorable trial judge, attempted to find some explanation for the "missing" X-ray of the chest, in the increased activity of the Korean War. Dr. Mead, her last treating doctor, would have none of it. What he did say was this (TR 642, lines 13-19):

> *"I don't think it is conceivable,* regardless of the work load that was there at that time, and knowing the efficiency of the X-ray department that an X-ray could have been taken on October 24th and not reported until November 8th or November 9th. There may have been a lag of one or two days in reporting the X-ray, but they usually got the report to us out of the X-ray department very quickly." (Emphasis added.)

Mrs. Madrigan's chest X-ray, was a routine, prescribed, pre-operative procedure. By any reasonable standard of good medical practice, that X-ray should have been in her jacket when she arrived for surgery on *October 29, 1951.* The mechanics, the instrumentalities behind the delay in this regard were in the exclusive control of persons for whom the Government is liable. We do not feel it our burden to isolate a particular individual who caused the deviation from the normal routines of the Government's hos-

pital. The deviation was caused by the error or omission of such a person. It was plain negligence and carelessness which deprived Mrs. Madrigan of the knowledge of her condition. (TR 570 et seq.)

Dr. Bulgrin, the radiologist, after advising that normally the X-ray was read the "next day", was asked for his explanation for the delay in the reading of the chest X-ray on *November 8, 1951* and the report of *November 9, 1951.*

> "Q. Your attention is invited to the fact, sir, that it (the chest X-ray) is dated November 9, 1951, on the upper left, and that the reading by yourself, sir, is dated November 8, 1951. Now, that's rather unusual, or was unusual under the system you were following at that time, wasn't it, Doctor?
>
> A. THAT'S AN ERROR OF SOME KIND, and I don't know how it came about. . . ." (Emphasis added.) (TR 572, lines 13-17.)

Dr. Mead could have sent a corpsman for the chest X-rays if they were not in the patient's file. There is no explanation by the Government, short of speculation, as to what delayed the chest X-ray under their exclusive control. Dr. Bulgrin appreciated that the chest X-ray was pre-operative and that under the usual, normal routine procedures of the hospital, the X-rays would "all then go back to the attention of the doctor so requesting them prior to the time that surgery was actually commenced." (TR 619.)

D. EVERY MEDICAL EXPERT AGREED THAT GOOD MEDICAL PRACTICE REQUIRED IMMEDIATE FOLLOW-UP LABORATORY TESTS, CLINICAL OBSERVATIONS AND CONFIRMATION OF DIAGNOSIS.

Tuberculosis is an insidious disease. Its early indications must be recognized for containment of the disease. Whether a lesion is tubercular, cancerous or otherwise potentially infectious and disabling can only be decided medically by prescribed, recognized and approved procedures. None of the experts quarreled with this basic concept. (TR 512, 513.) Dr. H. C. Hinshaw, after admitting that the chest X-ray of October 24, 1951 showed a "possible pathologic situation", was questioned as follows:

> "Q. You would, as a competent man in your field, want to rule out not only the *probability* of a lesion, the significant and potentially symptomatic, but also the possibility, would you not, sir?
> A. Yes.
> Q. And that would be good practice?
> A. Yes.
> Q. Universally?
> A. Yes." (Emphasis added.)

Dr. Bulgrin "was to be congratulated for having reported it. He obviously was looking at it very carefully", agreed Doctor Hinshaw.

We shall not belabor the record with cumulative extracts of testimony, save to assure the Court that the transcript reflects complete, unequivocal agreement of Doctors Kruisheer, Wilson, Shipman and Bulgrin that sound medical practice, in fact, common sense, would dictate follow-up procedures, tests and

clinical observations for further diagnosis and containment of the disease. Dr. Kruisheer tells us when tuberculosis was suspected at Parks Air Force Base, "We bodily send after them I mean" (TR 337, line 4), and the same procedure applies to dependents. Every suspected case of tuberculosis is reported. (TR 338, lines 3-4.) Could anything less be acceptable in view of the paternal concern of the Government for its servicemen and their dependents? Would anything less meet the requirements of good medical practice? We think not.

E. PLAINTIFF JOHNNIE ELMEASE MADRIGAN LED A HAPPY, HEALTHY, NORMAL LIFE WITH HER HUSBAND AND FAMILY UP TO 1951.

In 1951, a happy normal life was being observed by the Madrigan family. If they had disagreements, they were of a minor, quickly forgotten kind, common to any family. Because of her husband's position in the United States Navy, the Madrigans had to entertain, and were entertained frequently—but nowhere is there the slightest evidence, and all of the proof is to the contrary, that even up to 1953, Mrs. Madrigan was nothing more than a purely social drinker. Certainly she was not a compulsive one.

From 1951 to 1953, we see a gradual breakdown of this happy state of affairs.

Fatigue, irritability, family unpleasantness, and finally alcoholism itself, crept into Mrs. Madrigan's life.

Dr. Wilson reported his clinical history received from Mrs. Madrigan in these terms:

> ". . . She was just fatigued, upset, couldn't cope with things, found herself taking a nip too often in the morning time; life was just more than she could tolerate." (TR 256, lines 24-25; TR 257, line 1.)

What was the cause of these conditions?

F. TUBERCULOSIS IS INSIDIOUS AND MAY BE POTENTIALLY LETHAL DESPITE ABSENCE OF SO-CALLED CLASSICAL SYMPTOMS.

We cannot account for the Government's failure to X-ray Mrs. Madrigan in the years between 1951 and May, 1955; nor for her failure to exhibit the so-called "common" symptoms of tuberculosis, such as fever, weight loss, night sweats and the like.

But we can turn to *Diseases of the Chest,* a well known work by Dr. Hinshaw, the Government's principal witness, and the witness in whom the trial Court placed the greatest confidence, for an explanation (TR 526, 527, 528):

> "Severe and progressive pulmonary tuberculosis sometimes fails to produce any symptom which could be recognized by either the patient or his physician. Potentially lethal tuberculosis is compatible with apparent good health for a prolonged period. This failure to produce symptoms makes tuberculosis a treacherous disease which still claims victims in civilized health conscious communities. It would be a great advance if in tu-

berculosis control, every physician were aware that this disease may exist in an active form in persons without complaint, and that if symptoms are awaited, it may be in an incurable stage.

"Even though patients with advancing pulmonary tuberculosis may have no complaints referable to the lungs, they frequently have *general symptoms of indefinite character, nervous instability, excessive fatigue, vague abdominal discomforts, and other complaints indistinguishable from psychoneurosis, are common, and often attributed to unfavorable life situations.*

". . . When *symptoms are complained of* they commonly include fever, weight loss, night sweats, and other evidence of chronic infection. *Too frequently these are symptoms of overwhelming disease neglected for many months and extremely difficult to cure.*" (Emphasis added.)

And Dr. Wilson stated that he has:

". . . Seen patients with very far advanced destruction of lung who do not have symptoms and who do not lose weight and this is not an exceptional thing . . ." (TR 256, lines 10-13.)

The deterioration of Mrs. Madrigan's happiness and peace of mind were manifestations of a slow, but relentless infection with tuberculosis—which could have been checked and controlled in its early stages—but was not!

G. THE CREDIBLE MEDICAL TESTIMONY ESTABLISHES A CAUSAL RELATIONSHIP BETWEEN THE PATHOLOGY IN THE X-RAYS OF OCTOBER 24, 1951, AND THE ADVANCED INFECTIOUS PROCESS DIAGNOSED IN THE SPRING OF 1955.

1. The Great Weight of Medical Testimony Substantiates Mrs. Madrigan's Attack of May, 1955, as a Progressive Disease Having Its Origins in 1951.

Dr. Shipman, a *Government witness,* testified that in his opinion, the first evidence of tuberculosis "as far as the record goes, apparently was October 12 (sic) *1951* when a routine film was taken at the U. S. Naval Hospital in Oakland, California. Then nothing definite shows up until she was examined in Japan in 1955 when she was told she had T.B. *She had some tuberculosis during that entire period . . .*" (Emphasis added.) (TR 387.)

For emphasis, may we call this Honorable Court's attention to the following exchange between counsel and Dr. Shipman (TR 394, lines 23-25; TR 395, lines 1-5):

> "Q. Do I understand you to say, sir, that this was a continuing process from at least 1951 until the diagnosis was made in 1955, Doctor?
>
> A. That's right, yes.
>
> Q. And that there is then a definite relationship between the X-ray of 1951 and its findings and the findings in 1955, sir?
>
> A. *That's correct, yes.*" (Emphasis added.)

Then Dr. Kruisheer, member of the Department of Chest Diseases, Parks Air Force Base, told the Court (TR 323):

> "I believe that very much of the misery later on could have been prevented, and that lots of the costs of the disease later on could have been saved because I believe with reasonable certainty that the *etiology* of this lesion could have been established had there been the generally accepted method of investigation and establishing of diagnosis." (Emphasis added.)

And he added:

> ". . . and I strongly believe that indeed she (Mrs. Madrigan) had pulmonary tuberculosis, minimal active, in 1951, *which progressed to its final form* in 1955." (Emphasis added.) (TR 324, lines 17-19.)

To which Dr. Wilson added, in response to the question as to whether or not Mrs. Madrigan's disease process was a progressive thing, extending from 1951 to 1955:

> "In my opinion, this was a progressive thing." (TR 204, line 21.)

2. The Medical Testimony Is Also Overwhelming in Relating the Areas of Infection in Mrs. Madrigan's Lungs in 1955 to Those Shown in the X-ray of 1951.

Medical testimony throughout the course of the trial clearly pointed out that the "Acid fast reinfection etiology" (TR 214 et seq.), reported in the X-ray of October 24, 1951, was the area actually infected in May, 1955.

In support of this contention, we turn to the United States' most positive witness, Dr. Hinshaw, who, while

refusing to state whether or not Mrs. Madrigan actually *had* tuberculosis in *1951, does state that the areas of cavitation in 1955 were close and proximate to the site of the first suspected lesion, or that some of the cavities are in that general region.* (TR 546.)

Dr. Wilson says that he sees a definite relationship between the condition exhibited in the 1951 and the 1955 X-rays, and elaborates on the areas of involvement:

> "The later X-rays which I have seen show improvement of the same areas plus further involvement elsewhere in the lung . . . We see the same areas involved in the first and second anterior interspace . . ." (TR 201, lines 11-13; TR 202, lines 1-2.)

And, again under cross-examination by Government counsel, Dr. Wilson says:

> "In this case I think we can establish that the whole of the left upper part of the lung was involved in the 1955 disease, so the precise part of the projection in which the 1951 area was noticed must be part of that total 1955 disease.
>
> Q. But can you be sure that the whole upper part of her left lung was involved in 1955?
>
> A. I think we can, yes." (TR 279.)

And, if we may return to the testimony of Dr. Shipman, who, after comparing the report of Mrs. Madrigan's X-ray of 1951 (TR 382) and her X-rays of 1955 (TR 386), states, in answer to a *specific question* by counsel as to whether there was a "definite relationship" between the two X-rays, replies:

"*That's correct, yes.*" (Emphasis added.) (TR 395, line 5.)

We feel that this testimony, given by highly reputable men in the field of chest diseases today, irrefutably establishes a direct, proximate, and unbroken line of causation between the pathology revealed in the X-rays taken at the Oak Knoll Naval Hospital on October 24, 1951, and the acute infection with tuberculosis which was discovered in 1955.

We contend that no intervening force broke this chain of causation.

We feel that the evidence in support of our position speaks for itself, adequately and fully.

H. INASMUCH AS CHILDREN OF PRE-SCHOOL AGE ARE PRIMARILY IN CONTACT WITH THEIR PARENTS, LOGIC DICTATES, AND MEDICAL TESTIMONY SUPPORTS THE PROPOSITION THAT MRS. MADRIGAN WAS THE SOURCE OF THE INFECTION WITH TUBERCULOSIS OF PATRICIA AND ROBERT MADRIGAN.

It is well recognized that tuberculosis is an extremely infectious disease, and that close contact with an infected person required preventive precautions. (TR 664, 665, citing Navy Department precautions; see also California Health and Safety Code, Secs. 2571 and 2573.)

And Dr. Hinshaw, in his testimony, stated:

". . . A tuberculous mother very readily transmits the disease to her children by the very na-

ture of their intimate and oft repeated contact. It's quite unusual indeed to find a lady with tuberculosis whose children are tuberculin negative." (TR 446, lines 9-13.)

Further testimony reveals that upon discovery of the infection in Mrs. Madrigan, the maid as well as Commander Madrigan were tested, and to quote from the transcript:

"Q. And that only the mother had it?

A. (Dr. Wilson.) *She would then be the most likely source.*" (Emphasis added.) (TR 240, lines 14-15.)

From this testimony, we conclude that the tuberculosis infection discovered in both Madrigan children, was transmitted to them by their mother, and was the proximate result of the negligence of the staff of Oak Knoll Naval Hospital in failing to take proper and adequate steps to control this disease in 1951, when it was merely a "minimal infiltration", but nevertheless an *apparent* one!

I. DAMAGES.

As a dependent, Mrs. Madrigan was furnished the care of physicians without charge. However, there were actual costs, directly connected with her injury which are itemized below, together with such expense,

past and future, established by the evidence, covering the several plaintiffs.[2]

Mrs. Madrigan had a life expectancy of 40.28 years in 1958, being then of the age of thirty-five years. (TR 374-375.)

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[2]*Mrs. Madrigan's* special damages are as follows:

(1) Deductions from Commander Madrigan's Navy pay were $1.75 per day (90¢ for food; 85¢ for drugs and medication) from May 13, 1955 to March 5, 1956.

This involved a total of 298 days or an overall deduction of $521.50

(2) Sundry expenses were incurred by Commander and Mrs. Madrigan upon their return from Japan in 1955, which included travel, telephone calls, etc.

The total involved was stated to be..... $200.00
(TR 647.)

(3) Future expenses, as estimated by Dr. Wilson (Tr. 229, lines 18-20), involving X-rays, office visits to physicians, etc. will be at least $2,000.00

Thus, the total, actual and foreseeable medical expenses for Mrs. Madrigan total $2,721.50

Patricia Ann Madrigan's special damages are as follows:

Mrs. Madrigan's daughter, presently 10 years of age, was placed in a private boarding school (St. Catherine's Academy, Benicia, California) for a period of eight months during her mother's hospitalization.

Her residence at the school lasted from approximately July 1955 until March 10, 1956 at a cost to Commander Madrigan of $85.00 per month, or a total cost of..... $680.00

Her estimated future preventive medical care, including X-rays and office visits, and assuming a life expectancy of a total of sixty-five years, will approximate $20.00 per year for fifty-five years, or $1,100.00

Robert Edward Madrigan's special damages are as follows:

Mrs. Madrigan's 8 year old son also was placed in St. Catherine's Academy, a month later than his sister.

Charges attributable to his residency were..... $595.00

His estimated future curative and preventive medical care, including X-rays and office visits and assuming a life expectancy of a total of sixty-five years, will approximate $20.00 per year for fifty-seven years, or $1,140.00

Total damages attributable to the Madrigan children: $3,515.00

Total special damages are calculated to be..... $6,236.50

We leave for some future day the determination of a monetary evaluation of Mrs. Madrigan's pain, suffering, embarrassment and humiliation.

She has a function loss of approximately 20 to 30% in both lungs, and we have been advised that statistically there is a 30% chance of her having a breakdown in the future. (TR 335.)

Although her disease is not active, she will have to be observed over the years, prescribed for and be acutely conscious of avoiding emotional and other disturbances which could affect a recurrence.

VI. CONCLUSION.

The learned judge below was critical of Dr. Wilson's characterization of the sequelae of tubercular infection as "horrible". He was much more impressed with the "conservative tones" of Dr. Hinshaw's commentaries which ultimately were to extricate the Government from liability. It was Dr. Hinshaw who described the disease in even stronger language as *"potentially lethal"*. (TR 526, 527, 528.)

The distinguished jurist's summation, below, with which we must respectfully disagree, could find no negligence by any person for whom the Government was responsible.

Was it not true that Dr. Bulgrin did his job well? He came up with the most probable diagnosis—tuberculosis.

Then what? The X-rays of the patient's *feet* were routed so that they got where they were supposed to be—in her jacket, and to the attention of Drs. Mead and Cruise on *October 29, 1951.*

Where were the chest X-rays with a red danger flag attached literally shouting for attention? "Hear this, Doctor, your patient most probably is tubercular!"

But Drs. Mead and Cruise never got to see the chest X-ray or the report of a potentially lethal disease. Why?

The honorable trial judge says any number of things *could* have happened. The Navy folks were busy. The X-ray could have been misplaced, lost in the shuffle, misrouted—one could speculate ad infinitum. Dr. Bulgrin did his job. Drs. Mead and Cruise were interested in her feet, contended the Government. All this while every consideration of this transcript must convince that were the chest X-ray where it was supposed to be (prior to the appearance of the plaintiff *for surgery* on October 29, 1951), these Orthopedists—physicians, if your Honors please—unquestionably would have understood the simple medical description of tuberculosis.

There is not a scintilla of evidence that had plaintiff returned physically, i.e., "returned in one month"—that even then the X-ray would have been noticed by anyone. Dr. Mead had departed for other duties by *November 29, 1951.* Where the X-ray was until it became an exhibit in the case is still shrouded in mystery.

It was from this small hole in the dike that the accumulated waters finally burst. A fair view of Mrs. Madrigan's life between 1951 and 1955, *and* thereafter through the torturesome, lonely days of treatment,

care and concern of doctors like Captain Kruisheer, until the disease was arrested, will disclose the tremendous price paid by the Madrigans—a good Navy family.

The duty and dereliction of the Government are, if we may borrow an expression, as clear and convincing as the chest X-ray of October 24, 1951. The failure to advise and alert the patient to her disease is almost inconceivable under any decent standard of due care.

The Government dereliction was the most probable cause of the development of the insidious disease through varied patterns and symptoms until the final collapse of the patient.

Were the Madrigans damaged? The Government permitted Mrs. Madrigan to depart for a foreign country with the cryptic comment—"okay". In this manner was she examined for a potentially infectious disease! Her suffering, loss of confidence, deterioration of personality and living habits are clearly part of the cycle which for a prolonged period deprived her of the fundamental right to live her early life in reasonably good health and happiness.

The two Madrigan youngsters certainly had an inherent right to be free from acquiring this disease by contact with their infected mother.

Commander Madrigan, dependent upon Naval hospitals, institutions and physicians for the continued good health of his family, had a right reasonably to anticipate that were any member of his family in-

fected and the evidence of the infection made clear to Government medical personnel, that his Government would, following prescribed procedures, routines, regulations and law, diagnose the disease with medical certainty and undertake such course of treatment and continued observation as would produce healing and containment of the disease.

It would be a tantalizing travesty on justice if now the Government were permitted to exculpate itself by the simple device of some conjecture as to why this highly volatile and diagnostically sound X-ray and its interpretation was ignored by the person responsible for its control. Though we know not who these persons may have been, we are encouraged by the language of the Court in *Seneris v. Haas,* 45 C. 2d 811, in our belief that no such specific proof was necessary. Herein the Court, describing the nature and method of proof of malpractice, said the following:

> "Generally speaking, direct and positive testimony to specific acts of negligence is not required to establish it. Circumstantial evidence is sufficient either alone or in combination with direct evidence. Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inference drawn must be reasonable; but there is no requirement that the circumstances to justify the inferences sought negative every other positive or possible conclusion. The law is not so exacting that it requires proof of negligence or causation by testimony so clear that it excludes every other speculative theory."

See also *Christy v. Callahan,* 124 F. 2d 825, 827.

Respectfully do we urge the Court to reverse the findings of fact made by the learned trial judge and his conclusions regarding the law which followed, upon the authorities hereinabove cited. We cannot conscientiously agree that the evidence would sustain alternative findings. We feel it points unerringly to a judgment for the plaintiffs.

Dated, San Francisco, California,
December 15, 1958.

Respectfully submitted,
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